No. 560.

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Office Supreme Court U. S.
FILED.
FEB 23 1898
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

Filed Feb. 3, 1898.

JOHN BUDZISZ AND AUGUST BUDZISZ, (ALIAS) ANASTAZIUS BUDZISZ,

Plaintiffs in Error,

vs.

ILLINOIS STEEL COMPANY,

Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

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It plainly appears from the assignments of error, as well as from the record, that, unless it can be made to appear, as is claimed in assignment No. 1, "that there was a denial of rights claimed under treaties of the United States," no question arises or has arisen in the case to bring it within any of the clauses, subdivisions or provisions of Section 5 of the Act of March 3rd, 1891, establishing Circuit Courts of Appeals. And, therefore, this Court has no jurisdiction to review the judgment of the Circuit Court.

Whether then, the validity or construction of any treaty, made under the authority of the United States, was or is drawn in question in this case, is the sole question that arises upon the present motion.

And respecting this question, as there is no bill of exceptions bringing up the proceedings at the trial resulting in the judgment sought to be here reviewed, the Court having re-

to, were surveyed in 1834, and were offered for sale "by the President by his proclamation dated the sixth day of May, 1835."

It is further alleged that as to the lands involved in this action, situated in Milwaukee County, the title was in the Indians and had not been extinguished on the 29th day of May, 1830; that they were conveyed to the United States by the treaties above referred to. That they were surveyed "in the first quarter of 1835," and were offered for sale by the President May 6th, 1835. That the tract in Brown County, above referred to, containing 41.80 acres, was entered at the United States Land office at Green Bay, Michigan Territory, July 30th, 1835, by Increase Claflin and Daniel Darnell under the pre-emption act, 1834," and patented by the United States September 1st, 1838, to Alexander J. Irwin, assignee of Increase Claflin and Daniel Darnell.

It is alleged "that any pretended claim of title on the part of the Plaintiff to the lands in question is derived from a purported entry as a 'float' or 'floating right,' on July 30th, 1835, at Green Bay Land Office by one Daniel Darnell."

It is also alleged that the lands were patented April 16th, 1838, by the United States to Albert G. Ellis, assignee of Daniel Darnell.

It is not explicitly so stated, but we infer from the statements of the answer, that the pleader meant to allege, that the "float" or "floating right," by means of which Darnell entered these lands, was issued to him by the officers of the Green Bay Land Office by reason of the fact, that the joint pre-emption entry of Claflin and Darnell was of only 41.80 acres, so that, if that entry were valid, each of those men would, under the law as it then was, be entitled to a "float" or "floating right" to purchase and pay for a specified quantity of other public lands situated in the same Land District. That it was by means of such a "float" so issued that Darnell entered these lands.

It is alleged that the joint pre-emption entry by Claflin and Darnell of the tract in Brown County was "wholly void

and insufficient, and lacked the essential ingredients both in law and fact, both in the matter of residence and occupation under and by virtue of the several laws of the United States to authorize Increase Claflin and Daniel Darnell, or either or any of them to have, hold or locate any of the public lands of the United States as a 'float' or as a 'floating right,'" etc. And that, because such pre-emption entry was void for want of compliance with the laws of the United States, respecting residence, etc., the entry of these lands by Darnell under a floating right issued to him based upon that pre-emption entry, together with the patent issued to Ellis as assignee of Darnell, were also wholly void, and the prayer is that both the Brown County entry and the patent based thereon, and the Milwaukee entry and the patent based thereon, be cancelled and set aside.

It seems to be quite clear that this presents no question involving the validity or the construction of any treaty. The invalidity of the entries and the patents, if they were invalid, does not arise from any breach of the terms of any treaty, but from failure on the part of Claflin and Darnell to comply with the laws of the United States respecting pre-emptions and "floats," and the failure of the officers of the local Land Office to require such compliance before permitting the entry, and of the General Land Office in not requiring such compliance before issuing the patents.

It is conceded that the lands in question were offered for sale as public lands of the United States, by the proclamation of the President May 6th, 1835, and were entered at the proper Land Office on the 30th of July of the same year. It is also conceded that, at that time, all rights of the Indians to these lands, including the right to hunt and fish granted to them by the treaty of February 8th, 1831, were terminated. The most that can be made of the allegations of the answer is, that the officers of the Land Office were mistaken as to the laws of the United States respecting pre-emptions, or were deceived as to the facts upon which the pre-emption claims were based. There is no provision in any treaty with the

Menomonee Indians respecting or regulating pre-emption rights or claims. They arise, if they arise at all, under the laws of the United States, and their validity must be determined by those laws, and not by the terms of any treaty. So that, conceding that the Land Officers erred in permitting the pre-emption entry to be made, and in permitting the entry to be made under a "float" based upon such pre-emption entry, and in issuing the patents, either because they misconstrued the laws of the United States respecting pre-emptions, and accepted in consequence, as sufficient proof of entry, residence and occupation, to entitle the claimants to a pre-emption right, proof of such entry, occupation and residence made and done at a time when the lands were not subject to entry, occupation and residence under the pre-emption laws, or because they were deceived by the claimants as to what the facts were, in either case the error did not arise from the terms of any treaty, but from a misconstruction of, or a fraud perpetrated upon, the pre-emption laws of the United States.

If it were conceded, for the purpose of argument, that the lands were not open to pre-emption, even, at the time of the entry of them in July, 1835, or even that they were not then subject to entry, and that the patent for that reason is void, that would not result from the terms of any treaty, but from the laws of the United States. It is by those laws and not by the terms of any treaty that the question whether lands are subject to pre-emption, or to entry or sale, is to be determined.

This is so entirely clear, as it seems to us, and so completely demonstrates that any question arising in this case affecting the entry and conveyance of the government title to these lands, is a question arising under the laws of the United States and depending simply upon their proper interpretation and not under any treaty, that we might, we think, well end the discussion of this motion at this point.

But if the view just stated is incorrect, it still remains true that no question involving the validity or construction of

any treaty arises in this case, as we will proceed to demonstrate.

Courts take judicial notice of treaties.

U. S. v. Rauscher, 119 U. S., 407.

Of a geographical fact.

United States v. La Vengeance, 3 Dall., 297.
The Peterhoff, Blatch. P. C. (U. S.), 467.
[19 Fed. Cases on p. 343.]
The Apollon, 9 Wheat., 362.
Peyroux v. Howard, 7 Pet., 324.
U. S. v. Lawton, 5 How., 10, 15.

Of laws defining the limits of a city, Griffing v. Gibb, 2 Black 519.

Of the streets in a city, their relation to each other and the direction in which they run.

Brady v. Page, 59 Cal., 52.

Of changes in cities.

Brumagim v. Bradshaw, 39 Cal., 24.

Of the location of incorporated towns.

People v. Suppiger, 103 Ill., 434.

Courts also take judicial notice of the surveys of the public lands.

Atwater v. Schenck, 9 Wis., 160.
Prieger v. Insurance Co., 6 Wis., 89.
Hill v. Bacon, 43 Ill., 477.
Peck v. Sims, 120 Ind., 345, and cases there cited.

And of other public surveys made by the government.

Wright v. Phillips, 2 Greene, (Iowa) 191.
Hypfner v. Walsh, 3 Greene, (Iowa) 509.

That a public, navigable river, has been obstructed in cities and villages by bridges, buildings, and mill-dams, until it has ceased to be navigable in fact.

State vs. Carpenter, 68 Wis., on p. 170.

The Court will also take notice of the character of this land, that it is unfit for agricultural purposes, and is, in fact, part of the City of Milwaukee.

***Ex parte* Davidson, 57 Fed. on p. 887.**

The Court will therefore take notice that lots one and two of fractional section thirty-three, town seven north of range twenty-two East of the fourth principal meridian, constituted, when surveyed and sold by the United States, a long narrow slip consisting mainly of sand bank and marsh, one mile in length from north to south, lying on the lake front of the City of Milwaukee, almost exactly at the point of the deepest indentation of the bay of Milwaukee into the land, and almost exactly midway between the northern and southern extremities of the bay. That they lie on the east side of the Milwaukee River and between that river and Lake Michigan, the line dividing lot one from lot 2 being the center line of the section, that when they were surveyed by the United States, offered for sale, sold and patented, the southernmost end of lot 2 formed the north bank of the Milwaukee River, which at that point turned from its former northwesterly and southeasterly course and flowed eastward into Lake Michigan. That it was at that time extremely narrow at its southerly end, which was about 8 or 10 rods south of the section line of section 33, being at that point and for nearly 30 rods northward, not more than 8 to 10 rods wide. That owing to the character of the soil the shape of lot two, especially, was subject to great change, so that when the survey and map or plat in the partition judgment dividing the lots into lots, blocks and streets, which was introduced in evidence at the trial, were made in 1846, the southerly end had moved northward to a point somewhat north of the section

line and had become nearly or quite 450 feet wide. That at the time of the first survey, as well as in 1846, at a point about midway between the center line of the section and its south line, lot two broadened to a width of more than a thousand feet and narrowed again, so that at the center line of the section it was less than 400 feet wide. At a point a short distance south of the center of the section, an inlet or bayou entered the northwesterly face of lot 2, flowed in a southerly direction and reached the river again at a distance of 80 to 90 rods from the point of entry. This was navigable all the way for boats, and at the northern end, it had become in 1846, nearly 300 feet wide and deep enough to shelter good sized vessels, as vessels then were upon the lakes.

The portion of lot 2 west of the bayou was therefore an island, upon which a man named Jones had a ship yard, and from that circumstance the island was called "Jones Island," and now all of lot 2 is called "Jones Island."

In 1857 the City of Milwaukee finished the work of cutting through lot 1 at a point a short distance north of the center of the section, a new outlet for the river, commonly called "The Straight Cut." The effect of this was that easterly storms washed sand and gravel in from the lake, and in a short time filled up the bayou above spoken of, and made it firm ground, and also filled up the old mouth of the river, so that that also is now firm ground, and connects lot 2 with the mainland south of the old river mouth.

There is not and never has been any bridge connecting lot 2 with the City of Milwaukee, and the only means of access to it is by boat, except that it can be reached from the southward by passing over the old river bed. But that involves a long circuitous trip around slips, canals and other bodies of water which prevent access to the land south of lot 2, except by means of a long detour.

Lot 1 is almost solidly built over with large and expensive buildings, manufactories, warehouses and other buildings. The Milwaukee Gas Company's entire plant, and a large malting establishment stand upon it, and a line of ware-

houses almost solidly occupies its river front. The Milwaukee round-house, other buildings and part of the yards of the Chicago & Northwestern Railway Co. are upon it. Lot 2 is occupied by nearly 200 families, nearly all of whom are "squatters," and a large proportion of them are fishermen, and came from Germany directly to Jones Island, though many of them have in the past paid rent for their holdings to the owners of the soil, and some now do so.

Some time since certain wise newspaper men advised those people not to pay rent or sign leases until they knew who owned the land. The result has been, as is notorious in Milwaukee at least, that the officers of the law who have gone there seeking to serve process or papers have been mobbed and driven off. Scalding water and red pepper have been used upon them, and the law was for a long time successfully defied.

Under those circumstances this suit was brought, the Plaintiff being an Illinois corporation, and the value of the land occupied by the Defendants being ample to give the Court jurisdiction. The trial in the Circuit Court resulted in a verdict for the Plaintiff, directed by the Court.

In Beecher v. Wetherby, 95 U. S. on p. 525, this Court pointed out that the boundaries of the lands claimed by the Menomonee tribe of Indians were settled by treaty in 1825 (7 Stat. at Large, 272), and that the same boundaries were recognized by the subsequent treaty of 1831. (7 Stat. at Large, 342.)

The last named treaty was ratified by the Senate June 25th, 1832, except as to some provisions respecting the New York Indians, which do not affect these lands,and was proclaimed by the President July 9th, 1832. As to the provision for the New York Indians, a subsequent treaty was made October 27th, 1832, and proclaimed by the President March 13th, 1833. (7 Stat. at Large, 405.)

By the third article of the treaty of 1831, the Menomonees, "for the purpose of securing to themselves and posterity a comfortable home, hereby cede and forever relinquish

to the United States all their country on the southeast side of Winnebago Lake, Fox River and Green Bay, which they describe in the following boundaries, to-wit: Beginning at the south end of Winnebago Lake and running in a southeast direction to Milwauky or Manawauky River, thence down said river to its mouth; thence north along the shore of Lake Michigan to the entrance of Green Bay; thence up and along Green Bay, Fox River and Winnebago Lake to the place of beginning."

By the fourth article certain lands, not including, however, any lands south or east of the Fox River, were set apart to the Menomonees as a reservation, and provision was made for teaching them farming and housewifery, and allowing them an annuity, and ten thousand dollars in clothing, provisions and specie, was to be paid to them in six months from the date of the treaty. The object of the reservation and annuity being declared to be for the purpose of "weaning them from their wandering habits, by attaching them to comfortable homes," etc.

By article six it was agreed that the lands described in the treaty as part of the Menomonee lands lying west of Fox River, except the part ceded to the New York Indians—so-called—and their own reservation, "the Menomonees claim as their country," and would remain to them as theretofore for a hunting ground, "until the President of the United States shall deem it expedient to extinguish their title," and they promised that they would surrender it immediately upon being notified of the desire of the government to possess it. And they did cede it by the treaty of 1848.

The cession of all right or claim of right on the part of the Menomonees to the lands included within the boundaries above quoted was absolute, and took effect at the latest on July 9th, 1832, when the President's proclamation was issued.

There is not a word in the treaty which in any way restrains or prevents the public land laws of the United States from immediate application to the lands ceded, or in the least

limits their operation upon them. And without doubt, from the moment the President's proclamation was issued, the ceded lands became public lands of the United States, subject to survey, entry and sale as other public lands, and completely subject to the land laws of the United States then existing or thereafter enacted, and to the control of the Land Department of the Government.

It is our understanding, however, that the claim of the counsel for the Plaintiffs in Error, that the validity or construction of a treaty is involved, rests upon the first clause of the sixth article, which grants to the Indians the "liberty to "hunt and fish on the lands they have now ceded to the "United States, on the east side of Fox River and Green "Bay, with the same privileges they at present enjoy, until it "be surveyed and offered for sale by the President; they con-"ducting theselves peaceably and orderly."

But there is in that language no restraint or restriction upon the rights of the United States or its citizens to the lands. On the contrary, it recognizes in the most explicit manner the complete extinction of all Indian rights, except the right to hunt and fish upon the lands during the pleasure of the President. That the lands were to be surveyed while their right to hunt and fish continued to exist is expressly recognized, and that the lands would also be open to settlement is impliedly recognized by the condition that the Menomonees must conduct themselves "peaceably and orderly." That is to say, they might hunt and fish so long as they did not molest those who, under the laws of the United States, might enter or settle upon the lands.

But should it be conceded that the right to hunt and fish upon them operated, while it existed, to prevent the lands from becoming public lands of the United States, and subject to its land laws, it is conceded by the answer of the Plaintiffs in Error that the land on the bank of the Fox River, which was jointly entered under the pre-emption laws by Claflin and Darnell, was surveyed in 1834, and that the lands here in question were surveyed in the first quarter of 1835,

and all of them were offered for sale by the President by his proclamation, dated May 6th, 1835, so that on that day, if not before, the right of the Indians even to hunt and fish was absolutely at an end. The lands were then, if not before, public lands of the United States, in the control of its Land Department and subject to entry, sale and conveyance under its land laws, as other public lands were.

It is entirely certain that after May 6th, 1835, no treaty whatever stood in the way of complete control by the General Land Office over these lands, and over the sale and conveyance of them.

Whether the actual sale and conveyance of them was in accordance with law is, as we said above, a question which depends upon the proper interpretation of the laws of the United States upon the subject, and not upon the terms of any treaty, and therefore no question arises which enables this Court to take jurisdiction of the case.

But even if the question were one of which the Court could take jurisdiction, that is, if the Court could take jurisdiction of a question arising under the laws of the United States, it is certain that the entry and conveyance of the lands in question were in strict conformity with the public land laws of the United States, as an examination of those laws as applied to the facts as stated in the answer, will readily show.

We have not been able to find that any Act of Congress respecting pre-emptions, prior to the Act of May 29th, 1830 (4 Stat. at Large, p. 420, ch. 208), was permanent in character or general in application. They were all local and temporary. The Act of May 29th, 1830, while general in scope, was limited in its operation to one year from its passage, and applied only to those who were then in possession of public lands, and had cultivated part of them in 1829.

Section 2 of that Act provides, "That if two or more per-"sons be settled upon the same quarter section, the same may "be divided between the two first actual settlers, if, by a north "and south, or east and west line, the settlement or improve-

"ment of each can be included in a half quarter section; and in "such case the settlers shall each be entitled to a pre-emption "of eighty acres of land elsewhere in said land district, so as "not to interfere with other settlers having a right of prefer- "ence."

By section 3 of the same Act it was provided that, "All "assignments and transfers of the right of pre-emption given "by this Act, prior to the issuance of patents, shall be null and "void."

This Act expired by its own limitation in May, 1831. But, nevertheless, Congress passed an Act, which was approved January 23rd, 1832 (4 Stat. at Large, p. 496, ch. 9), to the effect that from and after its passage all persons who had purchased under the Act of May 29th, 1830, might assign and transfer their certificates of purchase, or final receipts, and patents might issue in the name of such assignee, anything in the Act aforesaid to the contrary notwithstanding.

By Act of Congress, approved July 14th, 1832, (4 Stat. at Large, p. 603, ch. 246), it was provided that where those who were entitled to pre-emption under the Act of May 29th, 1830, had not been or should not be enabled to make proof and entry of the same within the time limited, in consequence of the public surveys not having been made or returned, or where the land was not attached to any land district, etc., such persons might enter the same within one year after the removal of the disability which prevented the entry.

This Act, it will be seen, was passed after the President's proclamation of July 9th, 1832, announcing the ratification of the treaty of February 8th, 1831, and applied, without the shadow of a doubt, to the lands ceded by that treaty.

This Act is entitled "An Act supplemental to the act" of May 29th, 1830. By section 2 it was provided, "That the "occupants upon fractions shall be permitted, in like manner, "to enter the same, so as not to exceed in quantity one quar- "ter section; and, if the fractions exceed a quarter section, the "occupant shall be permitted to enter one hundred and sixty

"acres, to include his or their improvement, at the price afore-"said."

As no price for the public lands is named in the Act of July 14th, 1832, the words "at the price aforesaid," there used, relate of necessity back to the Act of May 29th, 1830, to which it is declared to be supplemental, and refer to the words, "the then minimum price of said lands," found in section 1 of that Act.

We cannot find that any other Act of Congress affects the question until the Act of June 19th, 1834, (4 Stat. at Large, p. 678, ch. 54), entitled "An Act to revive the act entitled 'An act to grant pre-emption rights to settlers on the public lands,'" approved May 29th, 1830.

By section 1 of this Act it was provided, "That every set-"tler or occupant of the public lands, prior to the passage of "this act, who is now in possession, and cultivated any part "thereof, in the year one thousand eight hundred and thirty-"three, shall be entitled to all the benefits and privileges pro-"vided by the act entitled 'An act to grant pre-emption "rights to settlers on the public lands,' approved May 29th, "1830; and the said act is hereby revived and shall continue "in force two years from the passage of this act, and no "longer."

This Act, as it revived the Act of May 29th, 1830, and those persons coming within its provisions were declared to be entitled to all the benefits and privileges provided by that Act, of necessity therefore revived and continued that portion of the Act which entitled each of the two pre-emptors of the same quarter section, which, of course, includes any fractional tract less than a quarter section, to a pre-emption right to enter or purchase another eighty acres of land in the same land district, which did not interfere with other settlers having a preference. The right to such a pre-emption or "float" then, survived and existed by law, leaving the Land Office to decide in each case, whether the necessary facts existed to bring the case within the operation of the law.

Almost immediately after the passage of that Act, the

question arose in the Land Office, what was revived by it, whether it revived the Act of May 29th, 1830, as it originally stood with the prohibition against assignments and transfers of the right of pre-emption given by it, including the right to transfer or assign "floats," or whether it revived that Act as amended by the Act of January 23rd, 1832, striking out that prohibition?

The Attorney General (Butler), gave it the latter construction, and this Court, in Marks v. Dickson, 20 How. 501, gave it the same construction.

It is admitted in the answer (fols. 11 and 12), that Claflin, with his family, occupied and lived in a good dwelling house upon the fractional tract on the bank of the Fox River, from the year 1832 to about May 10th, 1835, and cultivated part of the tract in the years 1833 and 1834, and was so living and occupying the tract on June 19th, 1834, at the passage of the Act of Congress above referred to, so that, if the lands were then, under the laws of the United States, subject to pre-emption, he was strictly within the letter of that Act. It is also admitted (fol. 13), that Daniel Darnell also occupied and cultivated a part of the same tract in 1833 and 1834, and was residing there on June 19th, 1834, so that he also was within the letter of that Act.

That these lands, including the fractional tract on the bank of the Fox River, were part of the "Public Lands," of the United States, and as such subject to pre-emption after the ratification of the treaty of February 8th, 1831, and the proclamation of the President, July 9th, 1832, cannot be doubted. The Milwaukee lands fell within a belt of lands which were claimed both by Massachusetts and Virginia. The rights of Virginia to them were ceded by that State to the United States, March 1st, 1784, and those of Massachusetts were ceded by that State, April 19th, 1792. Great Britain, in 1783, ceded to the United States all rights to the lands which she had not theretofore conveyed to Massachusetts or Virginia.

For the claim of Massachusetts and her cession, see "The

Public Domain With Statistics," pp. 36, 71, 87. For Virginia, ibid pp. 33, 87. For Great Britain's rights to them and her cessions of them, ibid pp. 1, 241.

From these cessions the United States became possessed of the absolute fee of the lands, which the Indians never possessed, but had simply a right to occupy them until they were wanted for improvement and settlement, and when that was or should be was solely determined by the United States.

Johnson v. McIntosh, 8 Wheat., 543.
Beecher v. Wetherby, 95 U. S., 517.
U. S. v. Cook, 19 Wall., 591.

In this last named case the Court said on p. 593, "The "right of the Indians to their occupancy is as sacred as that "of the United States to the fee, but it is only a right of occu- "pancy. The possession, when abandoned by the Indians, "attaches itself to the fee without further grant.

"The right of the United States to dispose of the fee of "the lands occupied by them, i. e., 'the Indians,' has always "been recognized by this Court from the foundation of the "government. It was so ruled in Johnson v. McIntosh, 8 "Wheat. 543, in 1823, and in United States v. Cook, 19 Wall, "591, in 1873. Other cases between those periods have "affirmed the same doctrine.

"Clark v. Smith, 13 Pet., 195

"See also

"Jackson v. Hudson, 3 Johns., (N. Y.) 375.
"Veeder et al. v. Guppy, 3 Wis., 502, and
"8 Opin. Atty. Gen., pp. 262, 264."
Beecher v. Wetherby, 95 U. S., on p. 525.

See also

Buttz v. Northern Pacific R. Co., 119 U. S., on p. 67.
U. S. v. Rogers, 4 How., 567.
Spalding v. Chandler, 160 U. S., 394, 402.

It is entirely certain that the lands in question were public lands of the United States, as well before the treaty of February 8th, 1831, as afterwards, in the sense that they were owned by the United States, and that a grant or conveyance of them by the United States would vest the fee of them in the grantee, subject, however, if the grant or conveyance was previous to the cession of the Indian right of occupancy, to such right until it was extinguished by cession or otherwise, as the United States should prescribe.

But though they were public lands of the United States, it would not necessarily follow that they were subject to the control of the Land Department, or to pre-emption, entry or sale under the land laws, prior to the termination of the Indian right of occupancy. It is said: ("The Public Do-"main with Statistics," p. 240), that "From the organization "of the National Government, it has been the rule of the "Nation to purchase the occupancy right from the Indians, "generally giving them more value in the compensation than "the use of the ceded lands is worth to the Indians. The "Government has never attempted to survey and dispose of "lands prior to their cession by the Indians."

By the first section of the Act of 1830, it was provided that every settler or occupant of the public lands, etc., "who "cultivated any part thereof, etc., was authorized to enter by "legal subdivisions, any number of acres, not more than one "hundred and sixty, to include his improvement, upon paying "to the United States the then minimum price of said land." The only restriction in that section limiting the public lands to which the Act was intended to apply, is in this proviso. "Provided, however, that no entry or sale of any land shall "be made under the provisions of this Act, which shall have "been reserved for the use of the United States, or either of "the several States, in which any of the public lands may be "situated."

Section 4, however, enlarges somewhat upon the restrictions upon pre-emptions, not so much perhaps respecting the lands to which the Act was applicable, as to the time and

manner in which the rights granted by it must be claimed and proved. It plainly recognizes, as within its scope, lands which had not then been offered for sale. Then follows this clause: "Nor shall the right of pre-emption, contemplated "by this Act, extend to any land which is reserved from sale "by Act of Congress, or by order of the President, or which "may have been appropriated for any purpose whatsoever."

Now it is not claimed that these lands were reserved for the use of the United States, or either of the several States. Nor is it claimed that they were reserved from sale by Act of Congress or by order of the President, or that they had been appropriated for any purpose whatsoever. As the Indian right of occupancy of these lands had been extinguished by the treaty of February 8th, 1831, so that the right of actual occupancy and possession, as well as the fee title had thus become vested in the United States and its citizens, they were public lands of the United States, and subject to its land laws within all the definitions of the term "Public Lands," which we have been able to find. And as they did not fall within any of the classes of lands excluded from the operation of the Act of May 29th, 1830, they clearly were subject to pre-emption by its terms and the terms of the Acts reviving it.

The Act of January 23rd, 1832 (4 Stat. at Large, 496), does not affect the question of what lands might be pre-empted. It simply repealed the clause contained in the Act of 1830, prohibiting any assignment or transfer of the right of pre-emption prior to the issuance of the patent, and permitted the transfer of the certificates of purchase or final receipts, and directed that patents might issue in the name of the assignee.

The Act of July 14th, 1832 (4 Stat. at Large, 603), removed some of the restrictions imposed by the Act of 1830, upon pre-emptions, but none that, so far as we can see, apply here, unless it may be that as these lands, as is claimed in the answer, had not then been surveyed, and perhaps had not been assigned to any land district, proof of entry and cultivation could not at that time be made. One concession to the

pre-emptor was in terms made by that Act, which was not in terms contained in the Act of 1830, and which was applicable here. It expressly provides that occupants of fractions might enter them, and it will be remembered that the joint entry of Claflin and Darnell on the bank of the Fox River was of a fraction. The gentleman who drew the answer seems to have thought that because it was a fraction it was not subject to pre-emption. (Fols. 6 and 7.)

The Act of June 19th, 1834, (4 Stat. at Large, 678), revived the Act of 1830, and removed still more of the impediments to entries under that Act without adding any new ones.

So that we respectfully submit, that the action of the General Land Office, in permitting Darnell to enter these lands by means of the "float," to which he became entitled by means of his joint pre-emption with Claflin, of the tract on the bank of the Fox River, was in strict conformity with the land laws of the United States.

We do not deny that this Court has power, in a proper proceeding and between proper parties, to inquire and determine whether the proceedings of the Land Department have been in accordance with law. But we respectfully submit, that this Court has no power or jurisdiction to inquire, in a collateral proceeding, such as this is, whether that Department erred or was deceived respecting the facts upon which the entry and conveyance were made.

Both of the propositions just stated are so well known and so conclusively settled by authority, that time will not be wasted in citing cases in support of them.

II.

But there is still another reason why this Court has no jurisdiction of the present writ of error, and would have none, even though the validity or construction of a treaty were drawn in question.

And that is, that the Plaintiffs in Error claim no rights

under any treaty, and do not even attempt to connect themselves with any one who does claim rights under a treaty, if there were any such person. They are almost exactly in the same position with the defendant in Owings v. Norwood's Lessee, 5 Cranch, 344. Like the defendant in that case, while asserting no rights themselves under any treaty, and being, as the defendant in that case was, absolute strangers to the title of the lands, which they admit they occupy without any claim or pretense of right, they seek, as the defendant in that case sought, to thrust in the way of the Plaintiff's right of recovey an alleged treaty, which they say is involved, and under which they say somebody else has rights (in that case Scarth, the Englishman, or his heirs, in this case the United States.) We submit that the United States is quite able, without the assistance of the Plaintiffs, to assert and maintain its rights to these lands, if it has any.

While it is true that in the Owings case the question of jurisdiction depended upon the proper construction of the 25th section of the Judiciary Act, yet the reasoning of Chief Justice Marshall in that case is just as applicable to this. He said: "The twenty-fifth section of the Judiciary Act "must be restrained by the constitution, the words of which "are, 'All cases arising under treaties.' The Plaintiff in "Error does not contend that his right grows out of a "treaty." On the next day he said it was not the meaning of the decision that the Court could not revise the decisions of the State courts as to the construction of a treaty, when that question arose incidentally, and added: "The reason "for inserting that clause in the constitution was, that all per-"sons who have real claims under a treaty should have their "causes decided by the national tribunals. It was to avoid "the apprehension as well as the danger of state prejudices. "The words of the constitution are, 'cases arising under "treaties.' Each treaty stipulates something respecting the "citizens of the two nations, and gives them rights. Whenever "a right grows out of, or is protected by a treaty, it is sanc-"tioned against all the laws and judicial decisions of the States;

"and whoever may have this right is to be protected. But if "the person's title is not affected by the treaty, if he claims "nothing under a treaty, his title cannot be protected by the "treaty. If Scrath or his heirs had claimed it would have "been a case arising under a treaty. But neither the title of "Scarth, nor of any person claiming under him, can be "affected by the decision of this cause."

The same provision of the constitution is the measure of the jurisdiction meant to be conferred on this Court by section 5 of the Act of March 3rd, 1891, as of that conferred by the twenty-fifth section of the Judiciary Act, and by section 709 U. S. Revised Statutes, which, as this Court held in Long v. Converse, 91 U. S. 105, means substantially the same as the twenty-fifth section of the Judiciary Act. And practically the same limit to the jurisdiction of this Court is prescribed in all three sections, because that limit is prescribed by the constitution.

A case under a treaty must arise to give this Court jurisdiction under either statute, and the test, whether it "arises" or not, must be the same under each of them. It is true that section 709 R. S., as well as section 25 of the Judiciary Act, go into greater detail in describing the classes of cases that may be removed from the state courts into this Court than section 5 of the Act of 1891. But it is submitted that it could not have been the purpose of Congress, in the latter Act, to give this Court jurisdiction in cases where, according to its own interpretation of the constitution, it did not have jurisdiction before, but to provide that certain of the cases of which, before that Act it did have jurisdiction, might be removed from the trial court directly to this Court without first passing through the Circuit Court of Appeals.

It certainly was not the purpose of the Act to change the test by which the courts determine whether a case arises under a treaty, so as to give jurisdiction over it to the courts of the United States.

The rule laid down in Owings v. Norwood's Lessees has

been followed and approved by this Court in many cases, among which are:

Fisher v. Cockerell, 5 Peters, 256-7.
Crowell v. Randall, 10 Peters, on p. 392.

In Hickie v. Starke, 1 Peters on p. 98, the same rule was adopted, though we do not find that Owings v. Norwood was cited by the Court.

The same rule was approved in

Montgomery v. Hernandez, 12 Wheat., 129.
Fulton v. McAffee, 16 Peters, 149.
Udell v. Davidson, 7 How., 769.
Henderson v. Tennessee, 10 How. on p. 323.
Wynn v. Morris, 20 How., 3.
Hale v. Gaines, 22 How., 149, 160.
Verden v. Coleman, 1 Black, 472.
Long v. Converse, 91 U. S., 105.
Miller v. Lancaster Bank, 106 U. S., 542.
Giles v. Little, 134 U. S., 645.

All of the foregoing cases arose under the twenty-fifth section of the Judiciary Act, or under section 709 R. S.

But the case of United States v. Old Settlers, 148 U. S. 427, did not. That was an appeal from the Court of Claims. And on p. 468 the Chief Justice, in delivering the opinion of the Court, used this language: "As a case arises "under the constitution or laws of the United States, when- "ever its decision depends upon the correct construction of "either, Cohens v. Virginia, 6 Wheat. 264, 379: Osborne "v. Bank of the United States, 9 Wheat. 737, 824, so a case "arising from or growing out of a treaty is one involving "rights given or protected by a treaty. Owings v. Nor- "wood's Lessee, 5 Cranch, 344, 348." Fully sustaining, we think, our contention, that the test for determining whether or not a question in a case arises under a treaty, so as to give the courts of the United States jurisdiction under the

clause of the constitution quoted in Owings v. Norwood's Lessee, is the same, whether it arises under the twenty-fifth section of the Judiciary Act, under section 709 R. S., or otherwise.

Without further elaboration of the discussion, we submit, that plainly in this case neither the validity nor the construction of any treaty made by the United States or under its authority is in any way "drawn in question." Especially is no such question raised by any person claiming any right, benefit or immunity under any such treaty. And no other question arises which by the terms of section 5 of the Act of 1891 permits this case to be taken directly to this Court instead of the Circuit Court of Appeals.

Attention may properly be called to the extraordinary position of the Plaintiffs in Error in this case. They admit by their answer that they are, and have been since 1891, in possession of the land in question, which they admit is part of the land patented by the United States to A. G. Ellis nearly 60 years ago. They do not pretend that they have any right to such possession, or to connect their possession with the United States, the Indians, or any other claimant of the title. They simply deny that they unlawfully withhold possession from the Plaintiff below, because, they say, the Plaintiff is not the owner in fee-simple, or entitled to the possession. As the Plaintiff in ejectment must recover, if at all, on the strength of his own title, or upon a previous actual possession unlawfully invaded by the Defendant, the Plaintiff in this case was obliged, in order to recover, to prove that it had such title and right of possession. So far as the answer contains such general denials, and thereby put the Plaintiff to the production of such proofs, it was not stricken out nor sought to be.

But the gentleman who drafted the answer seems to have imagined that under the law, the Court, at the request or suggestion of mere trespassers, utter strangers to the title, in order to assist them in retaining possession of a small part of the 77.70 acres of lots 1 and 2, section 33, town 7, range 22

East, which they do not claim to own, or to have ever bought or paid for,without any of the parties whose title is thus to be destroyed, except the Plaintiff in this case before it, will not only cancel, annul and wholly set aside the patent issued nearly 60 years ago to those two lots, but will also cancel, annul and set aside the patent to the fractional forty odd acre lot on the bank of the Fox River in Brown County, Wisconsin, respecting which lot there is no party whatever before the Court. And this, when the only party to be benefited by such action by the Court would be the United States. Because judgment that the title is in the United States, would be equivalent to judgment that these Plaintiffs in Error have no title, or right of possession as against the United States.

And this also, although more than 60 years ago, the United States sold all of those lands, received and has ever since retained the money paid for them, and nearly 60 years ago patented them, and has never since disclosed, so far as it appears, the slightest dissatisfaction with its bargain, or sought to rescind it, if it could.

It would indeed be a most extraordinary thing if to protect these trespassers in their wrongful withholding of the possession of the land in question, the Court should force the United States, without its consent and against its will, to resume the title and right of possession to lands which it sold and conveyed so long ago; and this too, when it could not itself, however much it might desire to do so, nor however just it might be that it should do so, maintain any action or proceeding in its own name or on its own behalf for that purpose, because of the bar created by section 8 of the Act of March 3rd, 1891. (26 Stat. at Large 1093, ch. 561.)

We know, of course, that the fact that the pleader has asked, in his prayer for judgment, for relief to which the facts pleaded do not entitle him, is no ground for refusing to grant him such relief, as under the law, the facts pleaded and proved entitle him to. But he could, under the general denial in his answer, not only put the Plaintiff to proof of its title or right of possession, as above pointed out, but he could also

prove any fact, which showed that the patent to Ellis was not merely voidable, but was void, so that it passed no title from the United States, and by that means defeat the Paintiff, without setting out in the answer the facts showing such patent to be void. So that in any view which can be taken of the question, even if the Court on this writ of error has jurisdiction to look into it, the Circuit Court was right in striking out the amended answer and the second amended answer.

As to the order striking out parts of the original answer, we shall not occupy time to consider it. It cannot be claimed that it presents any question which gives this Court jurisdiction to review it under the present writ of error.

As still further illustrating the extraordinary views of the law displayed on the part of the Plaintiffs in Error in this case, it may be observed, what the Court, however, cannot know judicially without examining the so-called bill of exceptions, that notwithstanding the patenting of the lands in question to Ellis, April 16th, 1838, and the fact that they are part of the City of Milwaukee, occupied and built upon, as stated above, and were not subject to pre-emption, even if the right of pre-emption still existed, (see section 2258 R. S.), they sought, at the trial, to be permitted to prove, that on March 17th, 1897, more than six years after the pre-emption laws were repealed by section 3 of the Act of March 3rd, 1891, (ch. 561), one F. W. Tamms, claiming to reside on lot 2 and to have, since on or about June 5th or 6th, 1888, with other persons, settled and improved said lots 1 and 2, made application at the local Land Office of the United States at Wausau, Wisconsin, to pre-empt for himself and all other persons then living thereon the two lots in question. That such application was rejected; that Tamms had appealed from such rejection to the Commissioner of the General Land Office; that the ruling of the local Land Office was affirmed by the Commissioner; that an appeal had been taken from the ruling of the Commissioner to the Secretary of the Interior, and that that appeal was still pending and undeter-

mined. All of which offers were, of course, rejected by the Circuit Court.

We respectfully submit, that this Court is, for the reasons hereinbefore stated, without jurisdiction to review, under this writ of error, any question which arises or has arisen in this case, and that the writ of error should be dismissed.

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